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IN THE

Supreme Court of the United States

October Term, 1970

No. 599

LUCKENBACH OVERSEAS CORPORATION,
Petitioner,

v.

ROY L. COMPTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

LUCKENBACH OVERSEAS CORPORATION,

Petitioner,

v.

ROY L. COMPTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 4, 1970.

Citations to Opinions Below

The memorandum opinion of the District Court for the Southern District of New York (R. 24) is unreported and is printed in Appendix B hereto, *infra*, p. 13a. The opinion of the Court of Appeals (R. 31) is unreported and is printed in Appendix B hereto, *infra*, p. 5a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 4, 1970 (R. 32). A petition for rehearing *in banc*

(R. 33) was
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Question

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Statement

Suit was
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sustained a severe football injury to his
(Appendix D, p. 36a) that re-
of fluid in 1960 (Appendix D, p. 39a),
(Appendix D, p. 37a) and further aspira-
(Appendix D, p. 36a). On March 11,
(p. 38a), respondent was examined by
medical examination as a
employment as a seaman.
During the course of that examination he
ever been hospitalized?" and "Have
by a doctor and the U. S. P. H. S. for
" and answered no to each
(Appendix D, pp. 37a, 38a). He signed the "pre-
although it contained the word
that he had never sustained." (Any seri-
(Appendix D; Defendant's Exhibit A).

by petitioner or respondent as a
for the basis of that deceitful medical
reported on May 16, 1960 that he had
aggravation of his prior knee condition on
aboard petitioner's vessel and that it was
of his prior knee injury without
sustained trauma and signed in two places
to that effect (Appendix D, Defendant's
reported to Gorgas Hospital in the
May 18, 1960 and the diagnosis was "Effu-
(L) (left) knee". (Appendix D,
with no intimation that respond-
accident on board the vessel
Exhibit C). The first record of
was made on May 25, 1960 (Appendix D,
after respondent had had suf-
consider the litigation potential of his
from older crewmembers (Appendix D,

After receiving that and other evidence the District Court delivered instructions that were unexceptionable but for its refusal to charge petitioner's requests to charge numbered 14, 15, 16, and 17 (Appendix D, pp. 42a, 43a) to the effect that if the jury found respondent had fraudulently concealed his knee condition on pre-sign on medical examination it should return a verdict for petitioner. The jury returned a general verdict for respondent on the liability phase of the case and awarded respondent $40,000 on the separately decided damages phase (R. 25).

The District Court denied petitioner's motions under Rules 50 and 59, Federal Rules of Civil Procedure (Title 28) for a directed verdict and judgment notwithstanding the verdict or for a new trial although he found that "The overwhelming evidence, including plaintiff's deliberate concealment of his prior injury and operation upon his knee . . . would militate against plaintiff's claim" (Appendix B, p. 17a). The District Court characterized respondent's "pre-sign on" falsehood as a "deliberate lie" which exposed "the defendant to the very risk which culminated in the jury's verdict *in favor of the plaintiff* in this case" (Appendix B, pp. 15a, 16a). The District Court also rejected petitioner's fraud argument on the sole ground that its authorities concerned contractual maintenance and cure involving no fault of the shipowner whereas the jury "presumably found that the injury was the proximate result of the vessel's unseaworthiness or defendant's negligence and we are bound by that finding" (Appendix B, p. 19a).

The Court of Appeals for the Second Circuit affirmed the decision on the Rules 50 and 59 motions on the grounds that the District Court's action was "within the permissible range of his discretion" (Appendix B, p. 8a), despite the finding below of respondent's fraud and "deliberate lie" and the District Court's opinion that there was "overwhelming" evidence against the verdict. The Court

of Appeals assumed that the District Court had applied the proper standard to the motion for a new trial since it had cited *Creagh* v. *United Fruit Co.*, 178 F. Supp. 301 (S. D. N. Y. 1959) containing "a full discussion of the proper standard to be applied to a motion for a new trial" as requiring the District Court to:

> "* * * abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not [Footnotes omitted]."

The Court of Appeals also affirmed on the fraud count mainly on the authority of *Still* v. *Norfolk & Western Ry.*, 368 U. S. 35 (1961).

Circuit Judge Moore dissented from the Rules 50 and 59 affirmance on the grounds that the District Court should be granted power to grant a new trial "when the verdict is 'overwhelmingly against the weight of the evidence'" and that "the role of a trial judge should be more than to serve as a conduit between the jury and the Clerk's office for the entry of judgment." (Appendix B, pp. 11a, 12a).

The Court of Appeals denied petitioner's petition for rehearing *in banc*, without opinion, on June 1, 1970 (R. 34-35).

Reasons for Granting the Writ

I. a. This Court should formulate rules for the guidance of the District Courts in reviewing and controlling verdicts of juries and, particularly, in deciding Rule 50 and Rule 59 motions for new trials in all jury cases, and particularly in the Jones Act and other maritime cases

that form the single major block of District Court litigation.[1] The decisions of the District Court and of the Second Circuit are at clear variance with those of other Circuit Courts and this Court should clarify and establish the positive legal duty of the District Court to intervene and grant, at least, a new trial when in its opinion a verdict is against the "overwhelming" weight of the evidence and represents a clear miscarriage of justice. It has not yet clearly done that.

b. The decisions of both the District Court and the Court of Appeals on the motion for a new trial in the instant case are in conflict with decisions of the Court of Appeals for the Third Circuit in *Magee* v. *General Motors Corporation*, 213 F. 2d 899, 900 (1954), of the Court of Appeals for the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350, 352-353 (1941) and *Snead* v. *New York Central R. Co.*, 216 F. 2d 169, 172 (1954), of the Court of Appeals for Fifth Circuit in *Marsh* v. *Illinois Cent. R. Co.*, 175 F. 2d 498, 500 (1949) and *Phoenix Indemnity Co.* v. *Girouard*, 252 F. 2d 146 (1958) and of the Ninth Circuit in *Moist Cold Refrigerator Co.* v. *Lou Johnson Co., et al.*, 249 F. 2d 246, 256 (1957).

Those contrary decisions of other circuits establish the proper rule respecting motions for a new trial aptly expressed by Judge Moore in his dissent from the majority opinion of the Court of Appeals here, that "the role of a trial judge should be more than to serve as a conduit between the jury and the Clerk's office for entry of judgment" (Appendix B, p. 12a). That rule finds concise

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[1] In fiscal years 1968 and 1969 respectively, 4,735 and 4,868 marine "federal question" injury suits were filed in the District Courts nationwide (Annual Reports of the Director, Administrative Office of the United States Courts, 1968 and 1969, Table C 2). This is by far the largest category of civil jury suits in the District Courts.

expression in the language of the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350, 352 (1941):

> "On such a motion *it is the duty of the judge to set aside the verdict and grant a new trial* if he is of the opinion that the verdict is *against the clear weight of the evidence*, or is based upon evidence which is false, or will result in a miscarriage, *even though there may be substantial evidence which would prevent the direction of a verdict*" (emphasis supplied).

In *Magee* v. *General Motors*, *supra*, the District Court had been "astounded" (213 F. 2d 899, 900) at the verdict and in *Marsh* v. *Illinois Cent. R. Co.*, *supra*, the District Court had termed the evidence "overwhelming against the plaintiff" (175 F. 2d 498, 500) and in each case the Court of Appeals had remanded with instructions to the District Court to grant a new trial if it was of the same opinion on remand. See also: *Phoenix Indemnity Co.* v. *Girouard*, *supra*, at 252 F. 2d 146 ("Here the trial judge did not state that the verdict was *contrary to the overwhelming weight* of the evidence or even that it was clearly and decidedly wrong, thus indicating that he *failed to apply the proper legal standard in exercising his discretion*") (Emphasis supplied).

Here the Second Circuit majority reasoned that since Judge Mansfield had cited *Creagh* v. *United Fruit*, quoted *supra*, he had obviously not really found the "overwhelming" evidence to be against the verdict, though that is what he had said (Appendix B, p. 17a), but that he really, if secretly, had entertained an opinion of the verdict consistent with *Creagh* and the language from it quoted by the Second Circuit, *supra*.

c. This Court will not hesitate to review the evidence underlying injury verdicts and set them aside even where,

as here, the District and Circuit Courts have refused to intervene, *New York, New Haven & H. R. Co.* v. *Henegan*, 364 U. S. 441 (1960) (an F. E. L. A. case, companion to the Jones Act) and has ruled that the setting aside of a jury verdict and the granting of a new trial, and even the granting of judgment notwithstanding the verdict, is not in violation of the Seventh Amendment, *Neely* v. *Eby Construction Co.*, 386 U. S. 317 (1967); reh. den. 386 U. S. 1027 (1967); *Galloway* v. *United States*, 319 U. S. 372 (1942); *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243 (1941). *Sentilles* v. *Inter-Caribbean Corp.*, 361 U. S. 107 (1959) is not controlling since there the District Court, which had heard the witnesses, did not express the radical disagreement with the jury's verdict stated by Judge Mansfield.

II. The Circuit Court relied mainly on *Still* v. *Norfolk & Western R. Co.*, 368 U. S. 35 (1961) in affirming Judge Mansfield's refusal to charge that respondent's fraud on his pre-sign on medical examination could require a verdict for petitioner. *Still* was an F. E. L. A. (45 U. S. C. A. §51, *et seq.*) case and is distinct from this seaman-shipowner case by reason of numerous factors rendering the state of health of a seaman applicant for employment of far greater importance to his prospective employer than that of a railroad applicant:

1. The shipowner may be held for maintenance and cure of a seaman who falls ill during a voyage for causes pre-existing the voyage and unrelated to his work or the shipowner's fault. A railroad may not be so held.

2. The shipowner warrants the fitness of the vessel, even as to latent defects. A railroad makes no such warranties.

3. The shipowner warrants the fitness of the seaman to all other crewmembers, *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336 (1955). A railroad does not.

4. A shipowner owes an ill seaman unearned wages for the duration of the voyage, *Jones* v. *Waterman S.S. Corp.*, 155 F. 2d 992 (3 Cir. 1946). A railroad assumes no such liability.

5. A shipowner must repatriate a disabled seaman from anywhere in the world, *Miller* v. *United States*, 51 F. Supp. 924 (S. D. N. Y. 1943). A railroad has no such economic burden.

6. A shipowner must divert its vessel, often at huge expense, to secure medical attention for an ill seaman, *The Iroquois*, 194 U. S. 240 (1904). A railroad is not under any such economic burden.

Still v. *Norfolk & Western R. Co.*, is accordingly not dispositive of the fraud issue and neither is Judge Mansfield's argument that petitioner's maintenance and cure authorities were inapposite since, "In this case, in contrast to the aforementioned cases cited by defendant, recovery is based not upon the contractual obligation of the shipowner but upon fault in the failure to provide a seaworthy vessel" (Appendix B, p. 18a). The general verdict forced Judge Mansfield to realize that the "jury presumably found that the injury was the proximate result of *the vessel's unseaworthiness* or defendant's negligence, and we are bound by that finding" (Appendix B, p. 19a; emphasis supplied). If the verdict was based on breach of petitioner's claimed warranty of the seaworthiness of the vessel, then it too was founded on a species of liability without fault arising from petitioner's acceptance of respondent as a seaman-employee which,

in turn, had been procured by the clear fraud of respondent. The jury should have been granted opportunity, on clear instructions, to decide the fraud issue and withdrawal of that phase of the case from the jury was clear error.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

WILLIAM A. WILSON,
Counsel for Petitioner.

August 24, 1970

APPENDIX A

Statute and Rules Involved

The Jones Act (Title 46, U. S. C. A. §688)

§688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

Federal Rules of Civil Procedure, Rule 50 (Title 28, U. S. C. A.)

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court

granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not

affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963.

Federal Rules of Civil Procedure, Rule 59 (Title 28, U. S. C. A.)

NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United

States; and [illegible]
of the grounds [illegible]
granted in [illegible]
States. [illegible]
without a jury, the [illegible]
has been [illegible]
ings of fact and [illegible]
and conclusions [illegible]

(b) Time for [illegible]
be served not later [illegible]
judgment.

(c) Time for [illegible]
new trial is [illegible]
the motion. The [illegible]
service within which [illegible]
period may be [illegible]
ceeding 20 days [illegible]
or by the parties [illegible]
permit such [illegible]

(d) On initiation [illegible]
entry of judgment [illegible]
der a new trial [illegible]
granted a new trial [illegible]
the parties [illegible]
matter, the court [illegible]
timely served, [illegible]
other [illegible]
therefor.

(e) Motion to [illegible]
to alter or amend [illegible]
than 10 days after [illegible]

As amended Dec. 27, [illegible]
eff. July 1, 1966.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 623—September Term, 1969.

(Argued March 26, 1970 Decided May 4, 1970.)

Docket No. 34155

ROY L. COMPTON,

Plaintiff-Appellee,

against

CRUCKENBACH OVERSEAS CORPORATION,

Defendant-Appellant.

Before: MOORE and FEINBERG, *Circuit Judges*, and BONSAL, *District Judge*.*

Defendant Cruckenbach Overseas Corporation appeals from a judgment against it in the United States District Court for the Southern District of New York in the amount of $25,000 in favor of plaintiff Roy L. Compton for in-

* District Judge for the Southern District of New York, sitting by designation

juries allegedly suffered while doing his job as a seaman on defendant's vessel. Luckenbach claims that the trial judge, Walter R. Mansfield, *J.*, erred in denying its motions for judgment notwithstanding the verdict and for a new trial. We affirm the judgment of the district court.

Plaintiff's complaint contained the usual joinder of an action under the Jones Act, 46 U. S. C. §688, with a claim based upon unseaworthiness. The trial took four days and seven witnesses testified, but the key issue before the jury was simple: whether to believe plaintiff's version of how he was injured. Plaintiff testified that he was told to clean up oil drippings in the steering engine room of the vessel, that the excessive oil there made his shoes slippery, that he slipped as he was ascending a metal ladder and that he twisted his knee, striking it on the edge of the stairs and injuring it. The testimony as to the unusual amount of oil on the deck was corroborated by a fellow employee, who attributed the oil to a leak: this was disputed by a witness for defendant. The evidence showed that plaintiff had suffered a prior football injury to his knee and had undergone surgery in August 1961, which plaintiff did not disclose at his physical examination before signing on the vessel. However, plaintiff testified that from the spring of 1962 until the accident in May 1966, the knee had given him no difficulty at all, even when he was engaged in strenuous activity.

There were a number of reasons why the jury might have regarded plaintiff's story of what happened as untrue. There were no eye witnesses to the accident, plaintiff continued to work the balance of the day and did not report the injury until two days later. There is also a conflict as to what plaintiff said even at that time. Plaintiff testified that when he reported for sick call he told his superiors

about the accident two days before. The ship's records and an accident report signed by plaintiff showed that plaintiff reported a recurrence of swelling and pain which arose out of the football injury some years before. Plaintiff later signed a second written statement to that effect when the ship returned to New York. Plaintiff said that he signed statements prepared by his superiors or a ship investigator when he was in pain and without reading them.

Clearly plaintiff's case was not strong and all of its weaknesses were fully exposed to the jury by the argument of defendant's counsel. The trial judge fairly presented the issues and the basic question before the jury was whether plaintiff's knee condition was due to a fall as he claimed or to the strain of normal work on a previously injured knee. The jury chose to believe plaintiff.

We are told that the trial judge had to set aside the jury verdict because the evidence against plaintiff "destroyed his credibility."[1] However, we do not agree. Resolution of issues of credibility is out of place in determining a motion for judgment notwithstanding the verdict; in Jones Act cases, at least, the issue is whether, "[looking] only to the evidence and reasonable inferences which tend to support the case of [the non-moving party]," there was sufficient evidence to go to the jury. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 57 (1949); *Ballard* v. *Forbes*, 208 F. 2d 883, 885 (1st Cir. 1954). We agree with the trial judge that under this standard the evidence here was sufficient.

Appellant also argues that Judge Mansfield erred in not granting a new trial; the claim is that because the judge found defendant's evidence "overwhelming" he was under a positive duty to set the verdict aside. Appellant is apparently arguing that we may set aside a determination by

[1] Appellant's brief, p. 4.

the trial judge that a verdict was not against the weight of the evidence, a proposition not accepted in this circuit. See *Portman* v. *American Home Products Corp.*, 201 F. 2d 847, 848 (2d Cir. 1953).* Moreover, without in any way suggesting that we would prefer to modify that rule, we note that Judge Mansfield's holding was within the permissible range of his discretion and we should not reverse simply because he exercised it one way rather than the other.

It may be that appellant is really arguing that the judge applied the wrong standard and thought himself absolutely powerless to weigh evidence on the motion for a new trial. After characterizing the evidence against plaintiff as "overwhelming," and remarking that as the trier of fact he would have decided the case differently, the judge said in a memorandum opinion:

> Our role at this stage of the proceedings, however, is a limited one. We may not disturb the jury's verdict unless there was no substantial evidence to support it. *Scintilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107 (1959); *Gebhardt* v. *Wilson Freight Forwarding Co.*, 348 F. 2d 129 (3d Cir. 1965); *Creagh* v. *United Fruit Co.*, 178 F. Supp. 301 (S. D. N. Y. 1959); Wright, *Federal Courts*, p. 370 (1963). Applying this standard, there was evidence even though extremely thin and tenuous, which, when viewed in the light most favorable to the plaintiff, supports the verdict. Accordingly, we

* In that case, Judge Learned Hand wrote:

> [T]here may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence. . . . [This rule] is too well established to justify discussion.

See discussion in Wright, Federal Courts, 422-23 (2d ed. 1970).

deny the motion insofar as it is based on insufficient evidence.

These observations were addressed both to the motion for judgment notwithstanding the verdict, and to the motion for a new trial. However, by his citations Judge Mansfield made clear his awareness of the full extent of his power to grant a new trial. The decision in *Creagh* in particular had a full discussion of the proper standard to be applied to a motion for a new trial; the opinion closed with an extensive paraphrase and quotation from the following passage in Professor Moore's text:

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not. [Footnotes omitted.]

6A Moore, Federal Practice, 3819 (2d ed. 1966). We have no quarrel with this standard. Nor do we feel justified in assuming that the trial judge did not apply the standard so clearly spelled out in one of the cases he cited on the specific point.

Finally, appellant argues that Compton's "fraud" in failing to reveal his prior injury and surgery vitiates his employment contract and destroys his Jones Act claim.[3]

[3] It is not clear whether appellant also attacks the recovery for unseaworthiness on this theory.

Appellant cites numerous authorities about which we pass no comment other than to note that they are all actions for maintenance and cure or unearned wages, which present unique considerations because of the nature of the vessel's liability. In any event, the Supreme Court passed upon the basic question raised and decided it adversely to appellant in *Still* v. *Norfolk & Western Ry.*, 368 U. S. 35 (1961), an FELA case. We are unable to perceive any relevant difference in policy on this issue between the FELA and either the Jones Act or appellee's action for unseaworthiness which would dictate a different result here. Accord, *Spinks* v. *U. S. Lines Co.*, 223 F. Supp. 371 (S. D. N. Y. 1963). The decision in *Still* was predicated on the dominant congressional policy of compensating injured workers, overriding the alleged fraud in forming the employment relationship. The same overriding policy is present here.

Judgment affirmed.

MOORE, *Circuit Judge* (dissenting):

I respectfully dissent from the determination of my brothers that there was no reversible error of law in the failure to grant a new trial on the ground that the verdict was against the weight of the evidence. In doing so, I wish to launch no attack on the principle stated by the majority that once a trial judge has determined that a verdict is not against the weight of the evidence, his determination cannot be set aside when denial of a new trial is reviewed on appeal from the final judgment. Cf. *Portman* v. *American Home Products Corp.*, 201 F. 2d 847, 848 (2d Cir. 1953) (*grant* of a new trial held not reviewable). But here Judge Mansfield quite clearly made the determi-

nation that there was "overwhelming evidence [which] would militate against the plaintiff's claim."

Although on appeal we should defer to a trial judge's evaluation of the weight of the evidence, we need not defer to conclusions of law based on such a determination. The view taken below of a trial judge's role in passing on a post-verdict motion was articulated to be that:

> "We may not disturb the jury's verdict unless there was no substantial evidence to support it."

This statement of the law is quite correct if "disturbing the jury's verdict" means entering judgment notwithstanding the verdict. It is not correct if it means ordering a new trial. As stated in Professor Wright's treatise on *Federal Courts*:

> "It has long been understood that if the trial judge is not satisfied with the verdict of a jury, he has the right—and indeed the duty—to set aside the verdict and order a new trial." *Id.* at 420 (2d ed. 1970).

Once the trial judge has made the determination that the weight of the evidence is "overwhelmingly" against the verdict, he has the duty to exercise his discretion in view of the overall setting of the trial. 6A Moore, Federal Practice ¶59.08[5] at 3819 (2d ed. 1966). The appellate court should be able to insist that a legal formulation be utilized in the exercise of this discretion which recognizes the distinction between the power to *grant* a new trial when the evidence is merely such that "the trial judge would have reached a different verdict" and the power to grant a new trial when the verdict is "overwhelmingly against the weight of the evidence."

Courts always seem to encounter semantic difficulty in articulating verbal standards for evaluating the weight of

the evidence in post-verdict motions. I have little confidence that this dissent, when applied to another set of circumstances, would enlighten the dark corners of the problem. Nevertheless, on the facts of this particular case, I am left with the firm conviction that there has been a miscarriage of justice. Recognizing the strict limitations on review of the denial of a motion for a new trial, 6A Moore, Federal Practice ¶59.08[5] at 3816 (2d ed. 1966), yet believing the role of a trial judge should be more than to serve as a conduit between the jury and the clerk's office for entry of judgment, I would remand to the trial judge so that he may rule again on the motion for a new trial in light of his own evaluation of the evidence and this court's discussion of the extent of his discretion.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1698

ROY L. COMPTON,

Plaintiff,

against

LUCKENBACH OVERSEAS CORPORATION,

Defendant.

MANSFIELD, D. J.

In this suit by a seaman for damages alleged to have been caused to his left knee as the result of a fall due to an oily condition in the gear room of defendant's ship, the jury brought in a verdict in favor of the plaintiff in the sum of $40,000.

The defendant has moved pursuant to Rule 50(b), F. R. C. P., for an order setting aside the verdict and entering judgment for the defendant n. o. v. or granting a new trial. For the reasons hereinafter stated, the motion is denied.

According to the plaintiff he suffered an accident aboard the defendant's ship on Saturday morning, May 14, 1966. As the sole eyewitness he testified that because of excessive oil on the deck of the engine steering or gear room, which made his shoes slippery, he slipped as he was ascending a metal ladder and struck and wrenched his knee. His recollection of the precise circumstances of the

accident was rather hazy at best. Although he had testified in an earlier stage that he fell from the ladder with his bucket, he testified later that he slipped without falling. It is undisputed that he continued working for the balance of that day. Along the same lines, while he testified that he worked only one hour on the following day, Sunday, May 15, 1966, the ship's regularly kept overtime records show him as working 8 hours that day.

Plaintiff's testimony as to the oil condition of the deck in the engine gear room was corroborated by a fellow shipmate but disputed by the Chief Engineer who was called by defendant and who testified that oil spillage was caught in specially built troughs, that no unusual oil spillage was reported on the day of the alleged accident, that the ladder had diamond-backed non-skid steps, and that the weather was clear and dry.

The circumstances surrounding plaintiff's version of his reporting of the accident to his superiors are equally suspicious and would in the Court's mind raise serious doubt as to whether any accident at all occurred as testified to by plaintiff. It is undisputed that plaintiff made no mention of any trouble in his left knee until two days after the alleged accident. On Monday, May 16, 1966, after working two hours, plaintiff reported pain in his left knee and according to plaintiff advised his superiors of his accident on the previous Saturday. On the other hand, the ship's records show plaintiff as reporting that he stopped work because he was suffering recurrence of swelling and pain in his left knee arising out of a football injury suffered by him back in the early 1960's and that plaintiff signed an accident report to such effect. A similar statement was signed by him later, on May 25, 1966, when the ship returned to New York. Plaintiff, who

had been educated through the 12th grade, testified that he signed the first statement, which was prepared by the First Mate, without reading it and while he was in pain. The investigator who prepared the statement signed by plaintiff after his return to New York testified that it accurately reflected what he had been told by plaintiff, and that the plaintiff read it before signing it.

It is undisputed that at the time of the alleged accident plaintiff had, in 1960, suffered an almost identical injury to the same knee, which had required extensive hospitalization and, in August 1961, had had an operation on the knee known as an arthrotomy at the University of Texas Medical Branch, Galveston, Texas. It is also undisputed that upon his application to defendant for employment in March 1966, plaintiff signed a statement (called a Pre-Sign-On Statement) in which he deliberately concealed the prior injury to his knee and his hospitalization in answer to specific questions in the statement. For instance, he answered "no" to such questions as whether he had ever been hospitalized, treated by a doctor, etc. His explanation for this deliberate lie in his application for employment with the defendant was that following the August 1961 operation on his knee in Galveston, and a period of physical therapy, he recovered completely and had not experienced any trouble with his knee since April 1962. In his later May 25, 1966 statement, however, he stated that ever since the August 1961 operation he would periodically suffer swelling and fluid in his left knee whenever he walked or stood up too much. Plaintiff's counsel further urged at trial that his concealment of his prior injury should be excused because he desperately needed employment when he made the false statements. The effect of this falsification, of course, was to expose the

defendant to the very risk which culminated in the jury's verdict in favor of the plaintiff in this case.

Following plaintiff's May 28, 1960, report to his superiors of the pain and swelling in his knee, plaintiff did no further work. He was [illegible] three days later by a doctor in Panama who drained fluid from the knee and suggested it might [illegible] ship's arrival in New York on May 31, 1960. Plaintiff reported to the United States Public Health Service at Staten Island, where his knee was [illegible] an operation on June 16, 1960. Following the operation there was a period of convalescence, [illegible] therapy, with plaintiff being released [illegible] Thereafter he was treated as an out-patient at the Marine Hospital in Galveston, Texas from [illegible] August 22, 1960, and on September 22, 1960, he was declared fit for duty.

Plaintiff testified to recurrent pain in his knee following exertion or cold weather. A transcript of testimony obtained by plaintiff to examine him shortly before trial gave the opinion, based upon his review of the Texas and New York hospital records [illegible] and his examination of the plaintiff, that plaintiff suffered a traumatic aggravation or activation of a pre-existing injury, a benign tumor of the membrane [illegible] knee joint, sometimes described as a [illegible] further testified that the condition was the cause of plaintiff's pain and would produce permanent disability in the flexion and use of his left knee. The same witness further testified, however, that [illegible] of the knee, such as plaintiff experienced about the ship shortly after the time of the alleged accident, could occur spontaneously without any trauma. To this extent the doctor

Appendix B—Opinion of the District Court

testimony was consistent with plaintiff's own statement made shortly after the accident to the effect that ever since the August 1957 operations he would periodically suffer swelling and fluid in the knee.

We have no hesitancy in stating that if this case had been tried to the Court we would have rendered judgment for the defendant in the ground that plaintiff failed to establish by a fair preponderance of the evidence either that the accident required as testified to by him or that his knee condition was a proximate result of the accident. The evidence, including plaintiff's deliberate concealment of his prior injury and operation upon the same knee, which proved substantially the same injury now claimed, and plaintiff's admitted suffering thereafter of a synovial effusion requiring removal of fluid, would militate against plaintiff's claim. Our role at this stage of the proceedings, however is a limited one. We may not disturb the jury's verdict unless there was no substantial evidence to support it. *Scintilles* v. *Inter-*, 362 U. S. 107 (1959); *Gebhardt* v. *Penn. Fenestrating Co.*, 348 F. 2d 129 (3d Cir. 1965); *United Fruit Co.* 178 F. Supp. 301 (S. D. N. Y. 1959); Wright, *Federal Courts*, p. 370 (1963). Under this standard, there was evidence even though conflicting and contradictory, which, when viewed in the light most favorable to the plaintiff, supports the verdict. Accordingly we deny the motion insofar as it is based on insufficiency of evidence.

Turning to the legal grounds urged by defendant at the close of the case for a directed verdict in defendant's favor, we consider the contention that since plaintiff concealed material facts with respect to his prior medical history and injury in his Pre-Sign-On Statement, no valid

contract of employment was reached by the parties, and the defendant was relieved of its obligations toward the plaintiff. The decisions relied upon by the defendant, *Mansi* v. *Isthmian*, 1965 A. M. C. 1902 (S. D. N. Y. 1965); *Zackey* v. *American Export*, 152 F. Supp. 772 (S. D. N. Y. 1957); and *Sammon* v. *Central Gulf S.S. Co.* (S. D. N. Y. 1969) (unreported; appeal pending), are clearly distinguishable and presented grounds which do not exist here. Both *Zackey* and *Sammon* involved claims for maintenance and cure, which is recoverable without a showing of fault. In both of those cases the plaintiffs had concealed prior conditions which recurred while they were employed on the vessel, and the court held that their failure to disclose the conditions relieved the shipowner of any obligation to compensate the seamen for their recurrence. Compare *Hazleton* v. *Lackenbach S.S. Co.*, 134 F. Supp. 525 (D. Mass. 1955), in which recovery was denied with respect to a recurrence of concealed gastric ulcers but allowed with respect to a disability arising from cancer unrelated to the concealed condition. In *Mansi* the claim was for unearned wages, recoverable without regard to fault when a seaman who has signed foreign articles loses time due to disability contracted while in the ship's service. In that case the seamen was stricken with an undefined illness after his pre-sign-on physical but before he signed foreign articles. He nonetheless signed the foreign articles. There was evidence from which it could be inferred that the seaman never intended to work, but signed the articles solely to become entitled to unearned wages.

In this case, in contrast to the aforementioned cases cited by defendant, recovery is based not upon the contractual obligations of the shipowner but upon fault in the failure to provide a seaworthy vessel. Had the injury

here been the result solely of the recurrence of the prior injury without fault on the part of the shipowner, there would have been no recovery in this action. The jury, however, presumably found that the injury was the proximate result of the vessel's unseaworthiness or defendant's negligence, and we are bound by that finding.[1] The jury would have been entitled to consider the plaintiffs' concealment of his prior injury as evidence bearing upon the question of contributory negligence, since the plaintiff obtained his job knowing of the injury and yet went ahead and exposed himself to the hazards of duty without informing his employer of the risk involved. The jury, however, found no contributory negligence and we cannot say that that finding is unsupported by any substantial evidence.

We must therefore deny defendant's motion insofar as it is based on this ground. In rejecting this ground, however, we take no position as to whether defendant may not have a valid legal claim against the plaintiff for fraud.

Defendant's alternative contention to the effect that the verdict of $40,000 was excessive must also be rejected. Although the award in that amount for aggravation of a pre-existing injury was indeed most liberal, particularly when one considers that a recurrence of the old injury might well have developed spontaneously and without the

---

[1] Although it might be argued that plaintiff's conduct in concealing his earlier injury in order to induce defendant to hire him placed him in a position analogous to that of a trespasser or wrongdoer, toward whom a landowner or public utility owes a lesser duty of care than toward others, see A. L. I. Restatement of Torts, Vol. II, §333, Prosser on Torts (2d ed.), pp. 432-436, no such contention has been advanced by defendant's counsel, who took no exception to the standard instructions given by the Court as to a shipowner's duty toward seamen employed aboard its ship.

trauma involved in the alleged accident, we cannot say that the award shocks the conscience or is grossly excessive or inadequate. See *Emaldio v. Pocohontas Steamship Co.*, 355 F. 2d 53 (4th Cir. 1966).

For the foregoing reasons the defendant's motions for judgment notwithstanding the verdict or in the alternative for a new trial or for a remittitur are denied.

It is so ordered.

WALTER R. MANSFIELD
U. S. D. J.

Dated: July 18, 1969.

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civil 1698

Judgment #70,156

ROY L. COMPTON,

Plaintiff,

against

LUCKENBACH OVERSEAS CORPORATION,

Defendant.

The issues in the above entitled action having been brought on regularly for trial before the Honorable Walter R. Mansfield, United States District Judge and a jury on April 1, 2, 3 and 4, 1969, and the jury having returned a verdict in favor of the plaintiff in the amount of $40,000., and the Court having reserved decision on the defendant's motion to set aside the verdict and for judgment N. O. V. or in the alternative for a new trial, and the Court thereafter on July 18, 1969 having handed down its decision denying the said defendant's motion, it is,

ORDERED, ADJUDGED and DECREED: That the plaintiff Roy L. Compton have judgment against the defendant Luckenbach Overseas Corporation in the amount of $40,000.

Dated: New York, NY
July 21, 1969

JOHN LIVINGSTON
Clerk

7/7/70 Bill of Costs taxed in favor of the plaintiff in the amount of $210.60 and added to the judgment.

JOHN LIVINGSTON
Clerk

APPENDIX C

Conflicting Opinions

MARSH v. ILLINOIS CENT. R. CO.

ILLINOIS CENT. R. CO. v. MARSH.

No. 12601.

United States Court of Appeals

Fifth Circuit.

July 8, 1949

Before HUTCHESON, SIBLEY and WALLER, Circuit Judges.

SIBLEY, Circuit Judge.

Marsh, called herein appellant, a fireman on a switch engine, sued for a personal injury alleged to have been caused by negligence in maintaining the switching track and the apron covering the coupling between the engine and tender, on which apron he stood in firing. At the conclusion of the evidence the defendant's motion for an instructed verdict was denied, and a verdict for plaintiff was returned. The defendant then moved for a judgment notwithstanding the verdict, or if that should be denied, for a new trial on the ground, among others, that the verdict was against the overwhelming weight of the evidence. The judge held: "The weight of the evidence is so overwhelmingly against the plaintiff that as a matter of law it becomes the duty of the court to withdraw the case from the jury and enter a judgment for the defendant. The motion for a new trial will be denied, and the motion of the defendant for a judgment notwithstanding the verdict of the jury will be entered for the reason that the motion for a directed verdict should have been sustained." The defendant then moved that the judgment be so amended as to grant

a new trial in the event of reversal of the judgment notwithstanding the verdict according to a form suggested in 3 Moore's Federal Practice, Sect. 50.03 and Suppl., and 4 Id. Sect. 50.05 p. 459. This motion to amend was overruled, the judge holding: "It is my judgment that the evidence was insufficient to go to the jury, but if I am wrong in that, then I do not think a new trial should be granted as there were no other errors of law." Appeal is taken by plaintiff from the judgment notwithstanding the verdict, and a cross-appeal by the defendant from the refusal of a new trial.

[1-5] 1. This suit, based on negligence, is in its substance one at common law, though modified by federal statute. The Seventh Amendment of the Constitution governs: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law". The last clause is a definite limitation on federal appellate courts, because at common law an appellate court could not revise a verdict and could award a venire de novo only for error in the trial; but the common law power of the trial judge to grant a new trial in his discretion, irrespective of error and merely because he does not think the verdict right, is fully preserved. Parsons v. Bedford, Breedlove & Robeson, 3 Pet. 433, 7 L. Ed. 732. This matter was fully dealt with in the Sixth Circuit by successive opinions by Judges Lurton, Taft and Harlan, in Mt. Adams & E. P. Inclined R. Co. v. Lowery, 74 F. 463; Felton v. Spiro, 78 F. 576; and Travelers Ins. Co. v. Randolph, 78 F. 754. The same distinctions were maintained by this court in Howard v. Louisiana & A. R. Co.,

5 Cir., 49 F.2d 571. A motion for a directed verdict, or for a judgment notwithstanding the verdict under Rule of Civil Procedure 50, 28 U. S. C. A., raises a question of law only: Whether there is any evidence which, if believed, would authorize a verdict against movant. The trial judge in considering those motions does not exercise discretion but makes a ruling of law; and if he errs the appellate court may reverse. A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; and he may grant one (and he alone can) because he thinks the verdict is wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected. The motion for a new trial is entirely independent of the other two motions and is governed by different principles, and has a different result. It never supersedes the jury, but as its name states, it results in another jury trial, perhaps with different evidence produced. But the motion for directed verdict or for judgment not withstanding the verdict if granted, ends the case.

[6] Rule of Civil Procedure 50, while altering the procedure in federal courts, did not alter the nature and effect of these motions, and each is entitled to be decided according to the principles applicable to it without confusing them. Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S.Ct. 189, 85 L. Ed. 147.

[7] 2. While it is not our function to weigh the evidence, we do agree with the trial judge's first expressed opinion that the weight of the evidence is "overwhelmingly against the plaintiff". But we do not agree that the grant of a judgment notwithstanding the verdict was therefore justified. There was evidence of the appellant,

not very explicit or positive, which if believed might authorize a jury to conclude he was hurt in the manner he claims. Because the trial judge does not believe it, because of appellant's own contradictions and conduct and of opposing evidence which seem to overwhelm it, is not ground for a judgment notwithstanding the verdict, and we must reverse that judgment. Howard v. Louisiana & A. R. Co., 5 Cir., 49 F.2d 571.

3. But it is ground for the trial judge to grant a new trial, though the trial was free of other error. He has in strong terms disapproved the verdict as contrary to the evidence, so much as to warrant setting the verdict aside and entering judgment for the defendant. We have reversed the entering of a final judgment, but it is evident that the new trial ought to be granted and would have been except for the misconception that absence of other error prevented it. The full discretion vested in the trial judge not having been exercised, we will remand the case with direction to the judge to grant a new trial instead of a judgment notwithstanding the verdict if he continues to think the verdict to be against the overwhelming weight of the evidence.

The judgment is reversed on both appeals and the cause remanded for further proceedings not inconsistent with this opinion. Reversed.

Appendix C—Conflicting Opinions

MAGEE

v.

GENERAL MOTORS CORP.

No. 11266.

United States Court of Appeals,
Third Circuit.

Argued June 8, 1954.

Filed June 21, 1954.

Before BIGGS, Chief Judge, and MARIS and GOODRICH, Circuit Judges.

MARIS, Circuit Judge.

This is an appeal by the defendant from the refusal of its motion for a new trial. The action had been brought against it by the owner of a Buick automobile which it had manufactured for injuries alleged to have resulted from a defect in the steering mechanism of the car. The jury brought in a verdict for the plaintiff in the sum of $50,000.00, whereupon the trial judge, the late Judge Burns, stated to them: "Members of the jury, I am astounded. It is my opinion that that is clearly against the weight of the evidence in this case." Motions for judgment notwithstanding the verdict and for a new trial were made by the defendant buf Judge Burns died before they could be heard by him. Subsequently they were assigned for consideration to another judge of the district court who refused the motion for judgment notwithstanding the verdict and also refused the motion for a new trial on condition that the plaintiff remit so much of the verdict

as was in excess of $31,060.00. 117 F.Supp. 101. Such a remittitur was filed.

[1-3] The defendant contends on this appeal that the verdict was against the overwhelming weight of the evidence and that the district court erred in refusing to grant a new trial on that ground. While it is true that a court of appeals will not reverse a judgment and direct a new trial solely on that ground, Miller v. United States, 3 Cir., 1943, 137 F.2d 592, the power and duty of the judge of the district court to do so in a proper case is settled and clear. Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 1941, 122 F.2d 350; Cheffey v. Pennsylvania R. Co., D.S.M.D.Pa. 1948, 79 F. Supp. 252; 3 Barron & Holtzoff, Federal Practice and Procedure, 225. It is for him to see that right and justice are done in the case before him, setting aside the verdict and granting a new trial if in the exercise of a sound discretion he thinks such action necessary to prevent an unjust result. And if he should fail to exercise his discretion in this regard he may, on appeal, be directed to do so. That is the situation here.

[4] The motion for a new trial was based, inter alia, upon the ground that the verdict was contrary to the weight of the credible evidence. The district judge in his opinion disposing of the motion did not discuss the weight of the evidence, however. He denied the motion for a new trial upon the ground that he was not free to reweigh the evidence or set aside the verdict because the jury might have drawn different inferences or conclusions or the court might have thought another result more reasonable, but must take the view of the evidence most favorable to the plaintiff. While this was the proper standard to apply to the disposition of the motion for judgment not-

withstanding the verdict, its application to the new trial motion amounted to an abdication of the judge's functions with respect to that motion. The case must therefore go back to the district court for reconsideration of the motion for a new trial in the light of the court's view of the weight of the evidence and all other relevant factors. Among these would obviously be the views of the trial judge expressed at the time the verdict was rendered. See Civil Procedure Rule 63, 28 U.S.C.A.

The judgment of the district court and its order refusing a new trial are vacated and the cause is remanded with directions to reconsider the motion for a new trial in a manner not inconsistent with this opinion.

APPENDIX D

Excerpts From Record

Defendants' Exhibit A

Pre Sign-on Physical Examination Report.

(Photoprint)

[For convenience of Court and Counsel this Exhibit is bound in on opposite page.]

MARITIME OVERSEAS CORPORATION
Steamship Agents
[illegible] BROADWAY, NEW YORK 6, N. Y.

RECEIV.
MAR 29 1966
SFTY./PERS. CLMS

SEAMAN'S PHYSICAL EXAMINATION REPORT

Name Billy Lee Compton Ship S.S. Horace Luckenbach
Rating AB Port Seattle Date 3-11-66
Date first assigned to vessel 3-11-66

Eyesight	No	Chronic Cough	No	Piles, Fistula	No
Ears	No	Stomach trouble	No	Nervous Breakdown	No
Nose	No	Back trouble	No	Rheumatism	No
Throat	No	Liver trouble	No	Skin disease	No
Lungs	No	Hernia	No	Jaundice	No
Heart	No	Varicose veins	No	Eye, ear trouble	No

Has applicant been rejected for any of the above? No
If so, when and where?

Has applicant, to your knowledge, been rejected for any of the USPHS for enrolling in the past five years? No
If so, when and where?

Billy Lee Compton

Applicant

Has applicant's statement as given above revealed the following defects:

Was this case referred to the USPHS for examination?
If so, when?

Signature M.D.

Date 3-11-66
Ship S.S. Horace Luckenbach
Rating Wiper

Signed
Shipping Commissioner

ATTACHMENT NO.

Defendants' Exhibit C

Medical Report of Duty Status.

(Photoprint)

[For convenience of Court and Counsel this Exhibit is bound in on opposite page.]

8372
Rev. 4-50

DISCHARGE CERTIFICATE
OR
MEDICAL REPORT OF DUTY STATUS

☑ Gorgas Hospital ☐ Coco Solo Hospital	Location	Place of Employment of Patient: Hosale Fuchenbach	Chart Number
Patient's Name: Compton, Roy L		I. P. Number	Birth Date: 1-9-43
Mailing Address		Type of Treatment: ☐ In-Patient ☑ Out-Patient	
Date Admitted	Date Discharged–Cleared	☐ Fit for Duty ☐ Limited Duty ☐ Quarters	Duration of Quarters or Limited Duty
Credit Manager		REMARKS: Effusion, chr. sinusitis, L Knee	
Admitting Clerk		To light duty - no climbing - avoid excessive bending of knee. Recommend follow-up by physician at time.	

[illegible] M. Y.

Signature of person authorized to prepare form: [illegible] (Date): 8-18-69

APR 1, 1969

C-32

Defendants' Exhibit E

Report of Personal Injury.

(Photoprints)

[For convenience of Court and Counsel this Exhibit is bound in on opposite page.]

DEFENDANT'S EXHIBIT # 2

FORM 470

MARITIME OVERSEAS CORPORATION

Steamship Agents

61 BROADWAY, NEW YORK 6, N. Y.

3172

REPORT OF PERSONAL INJURY

IMPORTANT.— (A) Investigate and report immediately every accident, however slight, to crew, stevedores or other persons.

(B) Obtain signed statements from all witnesses.

(C) 4 White Copies and blue copy to be forwarded to Maritime Overseas Corporation, N. Y. C. Yellow copy to be retained on board.

(D) If possible take photographs and save all parts of machinery or gear.

Name of Vessel S/S Horace Luckenbach Flag USA Voy. No. 24 From 5/2/66 To Still on Art.

1.—Injured Person

Name ROY L. COMPTON Occupation Wiper

Identification No. Z XXXX Z 1196662

Address 2609 Heron Lane, LaMarque Texas

Age 23 Married Single How many Children

Citizen of U.S.A. Where Born La.

Name of nearest relative Mother Pearl Compton

Address General Delivery LeCompte, La.

2.—Date man signed on 3/11/66 Where Seattle, Wash Before whom U.S. Ship Comm.

3.—Date crew paid off Still on Art. Where Still on Art.

4.—Date upon which man was paid off Still on Art. Where Still on Art.

Before whom N. A. Amount of wages paid Nil

5.—Wages per month $ 367.47

6.—(a) In whose employment Maritime Overseas Corp.

(b) How long employed Since 3/11/66

7.—Injury received: (a) Date 1963 (b) Hour Unknown (c)

(d) To whom first reported Reported to Chief Mate J. W. Coe (e) When 1000 5/12/66

8.—In what port was ship at time of accident Nil

9.—Describe fully how and where the accident happened Mr. Compton states that in 1963 he recieved an injury to his left knee while playing football. His knee was operated on during 1963, however he states that on several occassions the area around his knee has filled with fluid which had to be withdrawn with needle. He also stated that this condtion did not develope from any particular cause but rather thru normal use of leg and knee. He also stated that he had been advised that it was possible that he might have to have his knee cap removed at some future date.

(OVER) The above statment is correct

COPY SENT TO FRANK B. HALL & CO.

REPORTED TO MARINE INDEX BUREAU, INC. 165 BROADWAY, NEW YORK 6

Original card sent (date) 5/27/66

Suppl. card sent (date)

10.—Describe as fully as possible nature and extent of injury ~~Knee is swollen and filled with fluid from~~ just below knee cap to approx. 5 to 6 inches above knee.

11.—State what was done for the man after the accident with name and address of attending physician or hospital, if any. The man was relieved of all duties and told to remain off his feet as much as possible and to keep his leg elevated as much of the time as he could.

12.—Give statement, if any, made by injured person On Sat. I noticed that my knee had started to swell I did not report it because on some occassions this has happened and after resting it the swelling reduced itself. This ~~xxxxx~~ morning, however, it is quite painfull when I walk or stand on it.

Signed R. L. Colpitts, Oiler
S/S Horace Luckenbach

13.—Name of person in charge or superintending work at time of accident. Department head Mr. A. Pollutro, Ch. Eng.

14.—Was man able to return to duty? ~~Unknown at this~~ so, when? ~~Unknown at this time~~ time

15.—Was steamer loading or discharging? From or to deck or lighter? Vessel was at sea on 5/16/66

16.—What machinery or gear was in use, and was it in good order? Nil

17.—Was the man sober? Yes

18.—Was substitute signed on? No ~~at this time~~ On what date? N.A.

19.—Name of substitute Nil

20.—Name two prior employers of injured party

Date: 5/16/66

(Signature of Master, Surgeon or Officer)

Names of Witnesses to Accident and Persons Assisting in Work	Home Addresses
Attending only	
J. M. Cox, Ch. Mate	449 Cranmor Ct. Maywood, Calif.

Defendants' Exhibit F

Statement by Roy L. Compton.

(Photoprints)

[For convenience of Court and Counsel this Exhibit is bound in on opposite page.]

May 25, 1966

I am Ray L Compton of 2609 Heron Lane, La Marque, Texas Wiper on SS Horace Luckenbach Z 1196862

On May 16, 1966 I reported to the Chief Mate Mr. Coe that I was having trouble with my left knee. The left knee was injured in 1963 while I was playing football. I had an operation in Medical Center, Galveston, Texas. Ever since the operation I would get swelling and fluid in it when ever I walked or stood up too much. I signed on on 3/11/66 and until Saturday May 14, 1966 I had no problem, swelling or complaints with the left knee. On May 14, 1966 I was working alone in the Steering gear room. I was told by the first Engineer to clean up the oil spill in the pan under the pump. I was taking the oil out of the pan with rags and putting it in a bucket. There was also some oil on deck which came from the pan. I was working in the gear room for at least one half hour and had the deck and the pan cleaned up. During the cleaning I was on my knees and had oil on my shoe bottoms and my clothes. I was going up the stairs with the bucket in my right hand and held the rail with my left hand. In the middle of the ladder my left foot suddenly twisted

Ray L Compton

Hedlprm 1
45 476

and the left leg spun around and I banged
my left knee cap on one of the step edges.
I did not think anything of it and continued up
the stair When I turned my left foot no
oil spilled from the bucket and there was
no oil on the stair treads. I looked at
the bottoms of my shoes and both had a
film of oil on the soles. The oil clean up
is one of my regular jobs and I did it twice
before on the Ship. I worked all day Saturday
and Sunday and ~~Reported~~ went to work at 8 AM
Monday. The left knee was fine. Sometime
around 10 AM while soogeying and swipping
in the engine I felt a pain in the left
knee. I did not bang or twist my left knee
or leg on Monday 5/16/66. I reported to Mr
C.C. Chief 10 AM as the knee started to swell.
He took me off duty and I stayed in bed.
When we arrived in Panama I went to USPHS
and they drew 120 cc of blood from the
left knee I was ordered unfit for duty.
and have not worked since. When I signed
Ship Articles on May 16, 1966 I told both C/E &
Engineer and C/O Cook that I had twisted my
Roy L Compton

Redifprm 5
45 476

my left knee - leg on the stair from the steam room. When I signed the report of Personal Injury on May 16, 1966 I read it before signing it. I have read this statement of 2 1/2 pages and it is true & Correct

Roy L. Compston

Witnessed by

Ralph Schuler

17

Excerpts From Testimony

Roy L. Compton—Plaintiff—Cross

Q. Did you ever injure your left knee before May 14, 1966? A. Yes, sir.

Q. When was that? A. That was some time in '59 or '60.

Q. How did you injure it? A. I injured it in a football game.

Q. Did you receive any medical treatment for that left knee injury back in those days? A. Yes, sir.

Q. What was done for you? A. There was surgery on the knee.

Q. Where? A. At John Sealy Hospital in Galveston, Texas.

Q. Did you have any other treatment for your knee besides the surgery at the John Sealy Hospital in Galveston, Texas? A. You mean after the surgery? Yes sir.

Q. What did that consist of? A. The knee was swelling and I went back to have fluid withdrawn from the knee.

Q. When was the last time that you went to the John Sealy Hospital or to any other hospital or any doctor for medical treatment for your left knee as a result of the football injury? A. It was in April of '62.

(Defendant's Exhibit A received in evidence.)

Q. Now, despite the fact that you testified in November of 1966 that you had signed no such form, you did, in fact, sign the form? A. Yes, sir.

Q. Were you asked any questions at the time of this pre-sign-on physical examination? A. Nothing other than those on the form.

Appendix D—Excerpts From Testimony
Roy L. Compton—Plaintiff—Cross

Q. I beg your pardon? A. Just the ones on the form.
Q. You were asked the ones that are on the form? A. Yes, sir.
Q. Did you answer those questions? A. Yes, sir.
Q. You are quite certain you were asked those questions? A. Yes, sir.
Q. Were you asked if you had ever been hospitalized? A. Yes, sir.
Q. Ever at any time been hospitalized? A. Yes, sir.

Mr. Phillips: I object to the misstatement of the exhibit. There is no question on here that says have you ever been at any time——

The Court: This is cross examination. Overruled.

By Mr. Wilson:

Q. Just so there is no doubt about it. Would you take a look at this Exhibit A here. See that line I am pointing to? A. Yes, sir.
Q. Read that for me, will you? Read it good and loud. A. "Have you ever been hospitalized?"

Q. Is there an answer given to it? Is there an answer given to the question, "Have you ever been hospitalized"? A. Yes, sir.
Q. What answer did you give? A. "No."
Q. How long before this had you been hospitalized for the operation? A. It was some time in 1960.
Q. 1960? A. The operation was '61.
Q. The operation was '61? A. Yes, sir.
Q. Do you remember the month? A. August, '61
Q. That was in Galveston, wasn't it? A. Yes, sir.

Appendix D—Excerpts From Testimony
Roy L. Compton—Plaintiff—Cross

Q. Do your remember the date you were hospitalized during August of '61 for that operation? A. I think it was—I don't remember the exact date.

Q. Your best recollection. A. I don't remember.

Q. How long were you there, approximately? A. From August until—I don't remember exactly—the exact date.

Q. It was some time around August of '61. A. Yes, sir, when I had the operation.

Q. Were you asked at the time of this pre-sign-on physical examination whether you had been treated by a doctor for anything in the past five years? A. Nothing other than those answers on the form.

Q. My question is were you asked the question, this line I am reading here, right under the line that you just read me on the printed form, would you read that for us? A. "Have you been treated by a doctor and the U. S. P. H. S. for anything in the past five years?"

Q. In the past five years? A. Yes.

Q. Did you answer that question? A. Yes.

Q. What answer did you give? A. "No."

Q. U. S. P. H. S. is the U. S. Public Health Service Hospital, isn't it? You understand that to be the case, don't you? A. Yes.

Q. What was the date of your first hospitalization for any reason whatever? Can you remember? A. The date?

Q. Yes. A. Was the second month, 29th day.

Q. The second month, 29th day of what year? A. 1960.

Q. '60? A. Yes, sir.

Q. How do you remember it in terms of second month, 29th day? Are you recalling a typewritten date that you have seen somewhere? A. No, sir. I just remember it was in February, that's why I said the second month.

Q. February, 1960? A. Yes, sir.

Q. Where was that hospitalization? A. In John Sealy in Galveston.

Appendix D—Excerpts From Testimony
Roy L. Compton—Plaintiff—Cross

Q. S-e-a-l-y, it is a hospital in Galveston? A. Yes, sir.

Q. It is connected with the University of Texas, isn't it? A. Yes, sir.

Q. It is the medical center of the University of Texas? A. Yes, sir.

Q. What were you hospitalized for in February of 1960? A. I was hospitalized for bronchitis.

The Court: For what?
The Witness: Bronchitis.

By Mr. Wilson:

Q. Bronchitis? A. Yes, sir.

Q. Trouble with your knee? A. At that time?

Q. Yes. A. Yes, sir.

Q. What was the trouble with your knee? A. For the knee, the swelling.

Q. Sir? A. The knee was swollen on me.

Q. What was done for it, if anything? A. Well, they just withdraw fluid from the knee.

Q. Did they take fluid out at that time? A. Yes, sir.

Q. How long had you had trouble with your knee at that time, that is, February, 1960? A. That is when it was, in February, 1960.

Q. Is that the first time—that is, when you were in the hospital, I understand? Is that the first month that you had trouble with your knee swelling? A. Yes, sir.

Q. That, you say, was caused by an old injury? A. Yes, sir.

Q. Or an injury several years old at that time? A. Yes, sir.

Q. Now, when were you next treated for that knee condition, can you remember? A. It was in '61. I had an operation in August of '61.

Appendix D—Excerpts From Testimony
John Thomas Kearns—for Plaintiff

Q. Now, I didn't say operation. I am referring now to treatment. You tell us that you did have trouble with your swollen left knee in February of 1960? A. Yes.

Q. When after February, 1960 did you next have occasion to get any treatment or examination for that knee? A. After 1960?

Q. After February, 1960. A. It was, I guess, the third month of 1960.

Q. March? A. Yes, sir.

Q. You were being treated in John Sealy between February 19th and March of 1960 for bronchitis, weren't you? A. Yes, sir.

Q. It was at that time that you also had complaints about the condition of your knee? A. Yes, sir.

Q. After March of 1960, when you were released from John Sealy in connection with the bronchitis and the trouble with your knee, when did you next have treatment for that knee? A. That is when I went in August, '61 to have an operation.

Q. Did you not have any treatment or consultations with regard to that knee between March of 1960 and August of 1961? A. Yes, sir.

Q. When was the first of those? Tell us what they were between March, '60 and August of 1961. There is a year and a half in there. A. They were withdrawing fluid from the knee.

* * *

John Thomas Kearns—for Plaintiff

* * *

Direct examination by Mr. Phillips:

Q. Where do you live, Mr. Kearns? A. 450 West 19th Street right now.

Q. What is your occupation? A. Oiler.

Appendix D—Excerpts From Testimony
Cross examination by Mr. Wilson

Q. Are you a merchant seaman? A. Yes, sir.

Q. How long have you been going to sea? A. Twenty-five years.

Cross examination by Mr. Wilson:

Q. How did it come about that you came to the courthouse to tell us your story today? A. How is that? Because the young man recommended me.

Q. What young man recommended you? A. Mr. Compton.

Q. Recommended you to come and give testimony? A. That's right.

Q. How long have you known him? A. Just that one trip, that's all, about four months; three months or four months.

The Court: When you say "recommended," you mean he asked you to?

The Witness: Yes, sir.

By Mr. Wilson:

Q. When did he ask you to? A. That was on the ship. I told him that he should get a lawyer because he hurt his knee bad. That is the day he got off the ship. I'm the one that told him.

Q. You told him to get a lawyer? A. That's correct, yes, sir. He was limping bad. He was a green kid. He was green. I think it was his second trip at sea, anyway, you know.

Appendix D—Excerpts From Testimony Defendant's Requests to Charge

Defendant's Requests to Charge

14. A seaman is bound to disclose to a prospective employer the existence of a disease which he knows is likely to incapacitate him.

15. Because of their unusually close relationship a seaman owes a shipowner a high duty of good faith, particularly in the initiation of the employment, and the failure of the seaman seeking employment to inform the shipowner of a disabling disease of which the seaman is aware is a breach of duty, *Tawada* v. *United States*, 162 F. 2d 615 (9 Cir.); *Ahmed* v. *United States*, 177 F. 2d 898 (2 Cir.); *Hazelton* v. *Luckenbach S.S. Co., Inc.*, 134 F. Supp. 525 (D. Mass. 1955).

16. The test in this case is not merely whether the seaman reasonably expected that his prior condition was one of importance to the shipowner, that is, whether he felt he could reasonably perform his duties. Rather, it is that the seaman should provide truthful and complete answers to questions concerning his medical background to give his potential employer an opportunity to study his history and make a judgment as to whether or not he should employ him, *McCorpen* v. *Central Gulf Steamship Corp.*, 396 F. 2d 547 (5 Cir. 1968); *Sammon* v. *Central Gulf Steamship Corporation*, (S. D. N. Y. 66 Ad. 703—copy of opinion of Judge Cannella attached).

17. While ordinarily a shipowner who undertakes to conduct a pre-sign-on physical examination of a seaman is bound by its results, that is not the case where the seaman conceals something that he himself knows is or may be relevant to his employment, *Ahmed* v. *United States*, 177 F. 2d 898 (2 Cir. 1949). Consequently, there is a substantial difference between the situation where a seaman, thinking himself to be fit, fails to disclose a previ-

ous illness and the situation where the seaman either remains silent knowing himself to be unfit or denies a previous condition.

The Court: Now, the next three or four requests all relate to the failure of the plaintiff to disclose the existence of his knee condition at the time when he signed on. While it is true that there are some decisions, for the most part involving maintenance and cure, to the effect that if a seaman signs on while he is ill and fails to disclose an illness, which then breaks out, he is precluded by his concealment from seeking to hold the ship for maintenance and cure. That situation is different from one where the injury is alleged to have been caused by some negligence or unseaworthy condition on the ship, and that is allegation in this case.

If this seaman went aboard with an illness, such as diabetes in one case, tuberculosis in another, peptic ulcer in another, gastric ulcers in a fourth, and sought to recover for maintenance and cure because the condition broke out while he was aboard the vessel, his concealment then would probably preclude his recovery for maintenance and cure. But if that same seaman, because of an unseaworthy condition or negligence, experienced an aggravation or an activation of that condition, then I don't think that he would be precluded.

I think that the evidence of the condition or the fact that he concealed it is relevant, not only on the issues of credibility, but also on the issues of causation and negligence, but I don't think that as a matter of law it precludes him from recovery for alleged aggravation or activation of the condition on the part of the defendant. So I will not give those charges.

All right, gentlemen.

Mr. Wilson: May I respectfully except?

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IN THE

Supreme Court of the United States

October Term, 1970

No. 599

LUCKENBACH OVERSEAS CORPORATION,

Petitioner,

v.

ROY L. COMPTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ABRAHAM E. FREEDMAN
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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The memorandum opinion of the District Court for the Southern District of New York is unreported and is set forth in the Petition at Appendix B, pages 13a-20a. The opinion of the Court of Appeals is unreported and is set forth in the Petition at Appendix B, pages 5a-10a.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition at pages 1-2.

Questions Presented

1. Whether the Court below properly exercised its discretion in refusing to order a new trial where the opinion of the District Court shows that the judge carefully reviewed all of the evidence in the case, and in the exercise of his discretion, refused to grant a new trial.

2. Whether petitioner can raise the question of failure to properly charge the jury when it was neither urged nor briefed below.

3. Whether the obligation to furnish a safe place to work and a seaworthy vessel would be vitiated by a seaman's misrepresentation as to a prior injury.

Statute and Rule Involved

The Statute and Rules involved are set forth in the Petition at page 2.

Statement

This is an action by an American seaman for damages caused by the negligence of defendant, a steamship operator, and/or unseaworthiness of the petitioner's vessel, the S.S. "Horace Luckenbach", on May 14, 1966 (1a).

Respondent testified that he was employed thereon as a wiper (1a) and on the date of the accident was ordered by his superior officer, the First Assistant Engineer, to clean up oil drippings in the steering gear room of the vessel (2a).

He entered the steering gear room at about 8:30 A.M., accompanied by the First Assistant Engineer, and saw puddles of oil on the deck and under the machinery (2a-3a).

This condition was corroborated by the witness John T. Kearns, an Oiler aboard the vessel, who testified as to the oily condition of the deck and presence of an oil leak (7a-8a).

The respondent proceeded to work cleaning the oil with rags, walking about on the deck (2a). The testimony is undisputed that no way was provided to clean the deck without stepping onto the oil (2a-3a), and that while ascending the ladder leading from the steering gear room he was caused to slip, twisting his knee and striking it on the edge of the stairs (3a).

It was conceded by the Chief Engineer of the vessel that a puddle of oil, following the roll of the ship would, if walked on, make stair treads slippery (9a).

A statement was prepared by the Chief Mate and signed by respondent at the request of the Chief Mate (5a). Respondent was in pain at the time and in the belief that the Chief Mate had set forth what he had been told by the respondent, signed the statement twice without reading it (5a-6a). The statement, *inter alia*, referred to a prior football injury and surgery in 1963 (Petitioner's App. D, pp. 32a-33a), and made no reference to the accident. Actually the prior injury referred to occurred sometime in 1959 or 1960 (3a).

A subsequent statement taken by an investigator employed by petitioner which was signed by the respondent and read by him contained the details respecting his accident (Petitioner's App. D, pp. 34a-35a).

After undergoing surgery for the old injury to his left knee as a result of playing football, respondent continued receiving treatment consisting of aspiration of fluid on several occasions therefor until April, 1962 (4a). Between April, 1962 and March 11, 1966, when he joined petitioner's vessel (1a), he engaged in the sports of basketball, volley-

ball, and baseball, worked as a longshoreman and stock clerk in a hardware store, doing heavy lifting in both jobs without experiencing any difficulty whatsoever with his knee (4a).

As a result of the surgery in 1961, respondent had a scar which was plainly visible (6a).

Before joining the vessel he was required to take a pre-sign-on physical examination at which he disrobed (6a).

The issues were submitted to the jury which found for the plaintiff.

On the appeal below from the denial of the motions for judgment notwithstanding the verdict and for a new trial, petitioner neither briefed nor urged any error in instructions to the jury by the District Court (10a).

ARGUMENT

1. There is no conflict among the Circuits.

This Court has clearly and unambignously set forth the rule that the granting or refusal of a new trial is a matter resting exclusively in the sound discretion of the trial court. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933); *Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 572 (1887). Both the Court below and the District Court clearly recognized this rule in considering petitioner's motion and appeal and found no error to have been committed in the exercise of the trial court's discretion in refusing a new trial upon consideration of all of the evidence in the case.

Petitioner alleges that there is a conflict between the decisions of the Second Circuit and those of other Circuit Courts on the issue of the duty and power of the District Court to order a new trial in a proper case. However, not

one of the cases cited by petitioner supports its contention that a trial judge is divested of his right to exercise his discretion merely because he believes that the evidence is "overwhelming" in favor of one side where there is evidence from which the jury could have found for the other side and the trial court is aware of its authority to order a new trial if the facts warrant. Each of the cases cited unequivocally follow this Court's holdings in *Fairmount, supra,* and *Metropolitan, supra.*

In *Marsh* v. *Illinois Central R. Co.,* 175 F.2d 498, 500 (5th Cir. 1949); *Snead* v. *New York Central,* 216 F.2d 169, 172 (4th Cir. 1954) and *Magee* v. *General Motors Corp.,* 213 F.2d 899, 900 (3rd Cir. 1954), the Circuit Courts found on the facts of the cases that the District Court either improperly conceived its power (Magee) or failed to fully exercise its discretion (Marsh, Snead) and remanded the cases for reconsideration by the lower courts as to whether, in the exercise of their discretion, a new trial was warranted.

In both *Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F.2d 350, 354-5 (4th Cir. 1941) and *Phoenix Indemnity Co.* v. *Girouard,* 252 F.2d 146, 148 (5th Cir. 1958), denial of a new trial by the District Courts was affirmed as proper exercise of the Court's discretion to grant or refuse a new trial.

In *Moist Cold Refrigerator Co.* v. *Loy Johnson Co., et al.,* 249 F.2d 246, 256 (9th Cir. 1957), *cert. den.* 356 U.S. 968 (1958), the District Court granted a motion for judgment notwithstanding the verdict on the ground of excessiveness of damages adding the condition that, if reversed, the verdict was to be set aside and a new trial ordered. The Court of Appeals reversed the judgment n.o.v. and affirmed the grant of a new trial as a proper exercise of the court's discretion. It is patently obvious from a review of the foregoing cases that the purported conflict among the decisions is more fancy than fact, more wishful than real.

There can be no question but that the trial judge in the instant case fully comprehended the scope of his power and duties. In *Creagh v. United Fruit Co.*, 178 F.Supp. 301 (S.D.N.Y. 1959) cited by Judge Mansfield appears the following quotation from Moore's Fed. Practice, Par. 59.08[5], p. 3819:

> "The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not." p. 307

The trial judge also cited Wright, Federal Courts, 1963, to the effect that a court ". . . has discretion to order a new trial . . . if it believed that this, . . . would better serve the ends of justice." p. 370

In the absence of any conflict in the circuits, in the absence of any showing that the trial court committed flagrant error in the exercise of its discretion in denying the motion for a new trial, no writ should issue.

2. Failure to instruct the jury cannot be raised for the first time in the Petition for Writ of Certiorari.

Absent exceptional circumstances, Petitioner cannot raise the question of failure to charge when it was neither urged nor briefed below. *California v. Taylor*, 353 U.S. 553, 556n (1956); *Lucier v. United States*, 355 U.S. 339, 362n (1957); *Hursty v. United States*, 228 U.S. 694, 701-702 (1930).

Failure to instruct the jury on the issue of fraud was not before the District Court on the motion for judgment n.o.v. or for new trial, nor before the Circuit Court on the appeal from the denial of Petitioner's post-trial motions. Having failed to make a record with respect to this alleged error, it cannot now be advanced for the first time.

3. There is no important question of Federal Law.

The obligation to furnish a safe place to work and a seaworthy vessel cannot be vitiated by a seaman's misrepresentation as to a prior injury. *Still* v. *Norfolk & Western R. Co.*, 368 U.S. 35, 45 (1961); *Spinks* v. *U.S. Lines Co.*, 223 F.Supp. 371, 372 (S.D.N.Y. 1963). The Congress, aware of the distinctions between seafarers and railroad employees in enacting the Jones Act, 46 U.S.C. 688, nevertheless mandated that the Federal Employer's Liability Act, 45 U.S.C., Sec. 51 *et seq.*, shall be applicable to seamen. This Court is bound thereby.

The mere fact that Petitioner disagrees with the holding of *Still, supra*, does not raise a serious question of federal law such as would warrant grant of a writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpts from Testimony

(19) Roy L. Compton, the plaintiff herein, called as a witness, being first duly sworn, testified as follows:

* * *

(21) *By Mr. Phillips*:

Q. How far did you go to school? A. I went to the 12th grade.

Q. Are you making a claim here because of an accident that occurred to you? A. Yes, sir.

Q. What was the date of that accident? A. May 14, 1966.

Q. What was your occupation? A. I was a merchant seaman.

* * *

(22) Q. You were employed by Luckenback at that time? A. Yes, sir.

Q. What ship were you on? A. The SS Horace Luckenback.

Q. What was your job on that ship? A. I was wiper on that ship.

Q. What department were you working in? A. In the engine department.

* * *

Q. Had you ever sailed as a wiper before you joined the Horace Luckenback? A. No, sir.

Q. What were the duties of a wiper on board the Horace Luckenback in May, 1966? A. The duties of a wiper was cleaning, mopping, sweeping and other duties given to him by the first engineer.

Q. When did you first join the ship? A. I first joined the ship in March 11, 1966.

* * *

(24) Q. Where on board the ship did your accident occur? A. It occurred in the steering gear room.

Q. That is the steering gear room? A. Steering gear room.

Q. Where is that located on board the ship in relation to the rest of the ship? A. It is located at the rear of the ship.

Q. At what level of the ship? A. One flight below the main deck.

Q. How do you get to the steering gear room? A. You get there by a ladder.

* * *

(25) Q. Were you working at the time of your accident? A. Yes, sir.

(26) Q. Under whose orders were you working? A. The first engineer.

Q. What orders had you received from the first assistant engineer? A. I had received orders to go down to the steering gear room and clean up the oil that was over the deck and under the machinery and equipment in the steering gear room.

Q. Was the first assistant engineer your superior officer on board the vessel? A. Yes, sir.

* * *

(29) Q. You say that the first assistant engineer went with you to the steering engine room? A. Yes, sir.

Q. When you entered the steering engine room on this occasion, what did you observe with respect to the deck of the steering engine room? A. I observed oil, puddles of oil on the deck of the steering gear room, and also oil under the machinery.

* * *

(31) Q. Did the first assistant engineer tell you how to go about cleaning up this oil? A. Yes, sir.

Q. What did he tell you? A. He told me to take some rags and walk in this area with the rags and clean the oil up from under the machinery.

Q. Did he give you any sawdust? A. No, sir.

Q. Did he furnish you with a mop? A. No, sir.

Q. Now, how much time elapsed from the time that you first entered the steering gear (32) room until you had your accident? A. Well, it was between 10:30 and 11.

Q. What was between 10:30 and 11, is that when you had your accident? A. Yes, sir.

Q. What time did you first get into the steering engine room? A. About 8:30.

Q. Between 8:30 and 10:30 did you leave the steering engine room at any time before you had your accident? A. No, sir.

* * *

Q. Was there any way that you could do the work in the manner in which you were instructed without stepping onto the oil? A. No, sir.

Q. What type of shoes were you wearing at the time? A. I was wearing regular low, quarter work shoes.

(33) Q. Did you get oil on those shoes in the course of doing work? A. Yes, sir.

Q. Now, tell the Court and jury what happened to you. A. Well, after I had finished the job I was on my way up the ladder and I got about middle ways of the ladder, I slipped and twisted my knee and hit it on the edge of the stairs.

* * *

(43) Q. Did you ever injure your left knee before May 14, 1966? A. Yes, sir.

Q. When was that? A. That was some time in '59 or '60.

Q. How did you injure it? A. I injured it in a football game.

Q. Did you receive any medical treatment for that left knee injury back in those days? A. Yes, sir.

Q. What was done for you? A. There was surgery on the knee.

Q. Where? A. At John Sealy Hospital in Galveston, Texas.

Q. Did you have any other treatment for your knee besides the surgery at the John Sealy Hospital in Galveston, Texas? A. You mean after the surgery? Yes, sir.

Q. What did that consist of? A. The knee was swelling and I went back (44) to have fluid withdrawn from the knee.

Q. When was the last time that you went to the John Sealy Hospital to any other hospital or any doctor for medical treatment for your left knee as a result of the football injury? A. It was in April of '62.

Q. From April of 1962 until May 14th of 1966, did you have any problems with your left knee? A. No, sir.

Q. Did you engage in all of the activity that you had engaged in prior to the football injury? A. I engaged in all the activities except football.

Q. Did you have any problem with your left knee as a result of weather changes between April of 1962 and May of 1966. A. No, sir.

Q. Did you work during that period of time? A. Yes, sir.

Q. What jobs did you hold? A. I worked at a hardware store and I also worked as a longshoreman.

Q. What were your duties in the hardware (45) store you worked at? A. I was working at stock clerk and sometimes there would be heavy lifting.

Q. What was your job as a longshoreman? A. Loading and unloading ships. There could be heavy lifting work.

Q. Did you ever have any difficulty with your knee between April, 1962 and May, 1966 while doing any of this heavy lifting on these jobs? A. No, sir.

Q. Had you been in the steering engine room at any time prior to May 14, 1966 on board the Horace Luckenback? A. Yes, sir.

* * *

Roy L. Compton—for Plaintiff—Direct

Q. How many time had you been in the steering engine room before May 14th? A. I had only been there once.

Q. Do you have any regular duties which would take you back to the steering engine room? A. No, sir, not until the first tells me to.

Q. How long prior to May 14th did you go (46) back to that steering engine room? A. It was about two weeks.

Q. Under whose orders? A. Under the first engineer.

Q. What job were you ordered to do at that time? A. I was ordered to do the same job.

Q. What was the condition of the deck at that time in comparison to what you observed on May 14, 1966? A. It was in the same condition. There was puddles of oil all over the deck and under the machinery in the steering gear room.

Q. After this accident, did you sign any statements with regard to this accident? A. Yes, sir.

Q. Did you prepare the statement that you signed? A. No, sir.

Q. Were you asked to write out what happened to you? A. No, sir.

Q. Who prepared this statement? A. The chief mate.

(47) Q. Did you tell the chief mate what happened to you in the steering engine room? A. Yes, sir.

Q. Did you also tell him about your prior injury playing football? A. Yes, sir.

Q. What was your physical condition at the time that you signed the statement? A. Well, I was in pain and when he came, he asked me to sign the statements, and I signed the statements.

Q. What did the mate tell you before you signed the statement? A. He told me, "This is the report that you gave me," and I believed him and so I signed the statements.

* * *

Q. Did you read the statement before you signed (48) it? A. No, sir, I didn't read it.

Q. As a matter of fact, you signed it twice, didn't you? A. Yes, sir.

Q. Did you read either statement before you signed them? A. No, sir, I didn't.

Q. Did he ask you to read either one of the statements you signed? A. He didn't ask me to read; he just asked me to sign.

* * *

Q. Before you went on board the Horace Luckenback, were you required to take a pre-sign-on-physical examination? A. Yes, sir, I was.

(49) Q. Did you at that time complete a form which was given to you by somebody in the office wherever you took this examination? A. Yes, sir.

Q. At the time that you took this pre-sign-on physical, were you required to disrobe? A. Yes, sir.

Q. Did you have any—do you have any scar on your knee from the first injury? A. Yes, sir.

Mr. Phillips: May I ask the indulgence of the Court to permit the plaintiff to show to the jury the scar he had from the first injury?

The Court: Yes.

Mr. Phillips: Would you step down right here, over here where every one can see you, and would you raise your left trouser leg.

Step over here a little bit further. Would you point out to the jury the scar, the scar from the first operation?

* * *

The Witness: Yes, sir. This scar here is the scar from the first operation.

Mr. Phillips: Can everyone see that?

(50) Just walk down a little bit.

Would you also point out to the jury the scar from the second operation?

The Witness: Yes, sir, the scar, this top scar is the second operation.

* * *

JOHN THOMAS KEARNS, for Plaintiff:

(110) Q. When were you on board the Horace Luckenback? A. It was in May—it was in '66, anyway. You have the discharge there.

Q. I have here a certificate of seaman's service issued by the United States Coast Guard. Does that refresh your recollection as to when you were on board the vessel? A. That's correct.

Q. Would you look at the dates on there and tell us when you served on board? A. That would be April 8, 1966 to May 1, 1966—yes, that's right.

Q. Did you make any other trip on her? A. Yes, I made the coastwise, too. That would be May 2, 1966 to May 25, 1966.

Q. In what capacity did you sail on the Horace Luckenback? A. As oiler.

* * *

(111) Q. Did you have any duties with respect to the steering engine room? A. Twice a watch.

(112) Q. What would you do twice a watch? A. When you first take the watch over, you check the motors and check the oil to make sure that the oil is level in the gauges and to make sure the motors are not running hot.

Q. You have to go back there? A. That's right, twice a watch.

* * *

Q. Now, was there anything unusual about the steering engine room on board the Horace Luckenback? A. Yes,

it was oily. The decks were oily and wet and I reported it to Mr. O'Neill, my (113) boss, the third assistant.

* * *

Q. How much oil was there on the deck of the steering engine room? A. Just enough to make it slippery, you know.

Q. Was this a continuous condition when you served on board the vessel? A. It was. It was, indeed.

Q. Was it this way on May 14, 1966? A. That's right. That is correct.

* * *

(114) Q. Was anything done about this condition after you reported it? A. They cleaned it.

Q. After it was cleaned, what did you observe? A. It would still leak. Where the leak came from, I don't know.

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(242) ANTONIO POLLUTRO, called as a witness by defendant, being first duly sworn, testified as follows:

* * *

Direct examination by Mr. Wilson:

* * *

(243) Q. Did you ever sail on a vessel called the Horace Luckenbach? A. Yes, sir.

Q. Were you sailing on the Horace Luckenbach in May of 1966? A. Yes, sir.

* * *

(266) Q. What was your job? A. Chief engineer.

Q. How long were you chief engineer of the Horace Luckenbach? A. From April 15, 1964 until February 9, 1968.

Antonio Pollutro—for Defendant—Cross

Cross-examination by Mr. Phillips:

(267) Q. Now, if there is some oil, a puddle of oil on the deck, that puddle will follow the roll of the ship, will it not? A. Yes, sir.

Q. And wherever that puddle has been, there will be a film of oil, isn't that also correct? A. Yes, sir.

Q. And that film will be just as slippery as the puddle itself, isn't that correct? A. Yes, sir.

Q. If somebody has oil on his shoes and he walks on these nonskid—

* * *

Q. —diamond-backed, nonskid steel treads, there would be a deposit of some of that oil on the treads, isn't that correct? A. Yes, sir.

Q. And those treads would become slippery, isn't that correct? A. Yes, sir.

* * *

Excerpts from Petitioner's (Defendant-Appellant below) brief before the Circuit Court of Appeals

2

* * *

Defendant-appellant filed a timely notice of appeal and presses the following:

QUESTIONS PRESENTED ON THIS APPEAL

I. Did the District Court commit error in denying defendant-appellant's motion for an order setting aside the verdict and judgment notwithstanding the verdict on the grounds that the verdict was a miscarriage of justice?

II. Did the District Court commit error in denying defendant-appellant's motion for a new trial on the grounds that the verdict was a miscarriage of justice?

III. Did the District Court commit error in denying defendant-appellant's motion for judgment notwithstanding the verdict on the ground that Compton's fraudulent concealment of a prior similar injury to the same knee had vitiated his Jones Act employment contract?

* * *

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IN THE

Supreme Court of the United States

October Term, 1970

No. 599

LUCKENBACH OVERSEAS CORPORATION,

Petitioner,

v.

ROY L. COMPTON,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

LUCKENBACH OVERSEAS CORPORATION,

Petitioner,

v.

ROY L. COMPTON,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

Respondent's Brief in Opposition contends that petitioner may not argue before this Court the question of respondent's fraud on his pre-sign on physical examination (Petitioner's Point II, p. 8) because that issue "was not before the District Court on the motion for judgment n.o.v. or for new trial, nor before the Circuit Court on the appeal from the denial of Petitioner's post-trial motions" (Respondent's Brief in Opposition, Point 2, p. 6).

Respondent's argument is apparently based on the inconsequential failure of petitioner to base its fraud argument before the Court of Appeals on the narrow grounds of the District Court's refusal to charge on that issue, rather than on substantive merits (Petitioner's Brief before the Court of Appeals, Point III, p. 8).

Petitioner at the trial submitted requests to charge on the fraud issue and took proper exception to the District Court's refusal to submit those requests to the jury (Appendix D, pp. 42a-43a). The fraud point was again brought before the District Court on post-trial motions and the argument was rejected (Appendix B, pp. 17a-19a).

The issue was also clearly presented to the Court of Appeals in petitioner's Point III before that Court (Petitioner's Brief before the Court of Appeals, p. 8) and the Court of Appeals decided that issue against petitioner with no mention whatever that the issue was not properly before it (Appendix B, pp. 9a-10a).

The record clearly establishes that both the District Court and the Court of Appeals were presented with the issue of respondent's fraudulent concealment of his prior injury and that both Courts considered it. Respondent would now apparently have this Court refuse to review the ruling of the Court of Appeals on that issue because it was presented to the Court of Appeals on a substantive basis without precise mention of the District Court's refusal to charge, rather than on that narrow procedural basis. Since the requests to charge had been made and denied and those charges and that denial were before the District Court and the Court of Appeals (Certified Record Before This Court, Document 30, pp. 276-278) this Court should reject the highly technical argument of respondent and decide the issue of respondent's concealment of his prior injury on the merits.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

WILLIAM A. WILSON,
Counsel for Petitioner.